ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 81-5169

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SUPREME COURT, U.S.

ELIGAAH ARDALLE JACOBS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ELIGAAH ARDALLE JACOBS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the Citations to the Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages one through five of the Petition.

Respondent does not accept the Petitioner's Question Presented in that said Question is argumentative and does not objectively present a concise issue to be reviewed.

QUESTION PRESENTED

WHETHER THE TRIAL COURT AND THE FLORIDA SUPREME COURT IN REVIEWING THE DELAY IN BRINGING PETITIONER TO TRIAL OCCASIONED BY THE STATE'S INTERLOCUTORY APPEAL FROM THE GRANTING OF A MOTION TO SUPPRESS EXCEEDED THE TIME PERIOD PERMISSIBLE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.191(d)(2)(iv).

STATEMENT OF THE CASE

Respondent accepts those portions of the Statement of the Case set out by Petitioner in his Petition for Writ of Certiorari which are not argumentative and are germane to the issue to be reviewed. Respondent would invite this Court to review the Statement of the Case as set forth by the Florida Supreme Court in Jacobs v. State, 396 So.2d 1113 (Fla. 1981) which provides:

> Jacobs' second point on appeal is that the 180 day Speedy Trial Rule was violated. Jacobs was taken into custody on November 17, 1974. On February 26, 1975, he filed a Motion to Suppress certain evidence which was granted on March 17, 1975. On March 18, 1975, the State sought, and the trial court granted, a continuance to take an interlocutory appeal of the Suppression Order. Fla.R.Crim.P. 3.191. Successive motions for extensions of time were granted the State by the trial judge including the June 11, 1975, extension for a reasonable period of time after the appellate court filed its opinion in the interlocutory appeal. The mandate of the appellate court (reversing and remanding the trial court's order granting the motion to suppress) was received by the trial court on November 6, 1975. Jacobs was brought to trial on February 10, 1976.
>
> Jacobs argues that the trial court's initial extension of time was for sixty days and that, because the subsequent extension were outside the trial court's jurisdiction during the appeal, the Speedy Trial Rule was violated.

[Id. at 1115-1116]

HOW THE CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

The Florida Supreme Court in addressing the sole issue before it, to-wit: whether Florida's Speedy Trial Rule had been violated, held:

> Jacobs is in error. A review of the record reveals that the initial extension of time was not limited to a time certain. The extension was for a reasonable time in which the State could expeditiously pursue the interlocutory appeal. The additional extensions of time were effective because only the trial court, not the appellate court, may grant an extension of speedy trial time, while an interlocutory appeal is pending. State v. Barnett, 366 So.2d 411 (Fla. 1978).
>
> The June 11, 1975 order of the trial court validly extended the time until a reasonable period after the appellate court filed its opinion. As we stated in State v. Jenkins, 389 So.2d 971, 974 (Fla. 1980):
>
> > "If the trial court grants an extension for the period of the appeal plus 'a reasonable period after issuance of the appellate mandate' without specifying the number of days, the time period under Rule 3.191(a) is not controlling, and only the constitutional test of reasonableness is applied . . ."
>
> In the absence of these time limitations, the question of whether a trial date affords defendant a speedy trial must be determined in the light of the circumstances of the particular case as a matter of judicial discretion. The mere lapse of time before trial is not the only fact to be considered under such circumstances. This was the reasoning in State ex rel Butler v. Cullen, 253 So.2d 861 (Fla. 1971), where defendant sought a continuance. This rule is equally applicable when the State seeks a continuance. See King v. State, 303 So.2d 389 (Fla. 3 DCA 1974).

[396 So.2d at 1116]

The issue before the Court as to whether Florida's Supreme Court violated the Florida Speedy Trial Rule in Petitioner's case does not rise to the level entitling Petitioner to relief by this Court. No federal question has been asserted.

Petitioner's contention that he has repeatedly advanced that the denial of a speedy trial violated his fundamental due process rights and is reflected by the overall tenor of the record is incorrect. This issue as to whether Petitioner's constitutional right to a speedy trial has been violated has never been presented to a State appellate court. Therefore, pursuant to Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969), the issue should not be entertained by this Court.

REASONS FOR NOT GRANTING THE WRIT

Petitioner attempts to expand his complaint presented to the Florida trial and appellate court regarding whether his speedy trial has been violated by suggesting that not only did the State of Florida violate his right to speedy trial under Fla.R.Crim.P. 3.191, but also violated constitutional speedy trial in that the delay of approximately fifteen months from the date of his arrest was an unreasonable delay and therefore, requires review by this Court.

The limited issue before the Florida Supreme Court was:

> "Should a judgment of guilty of murder in the first degree on two charges of homicide and two death sentences be allowed to stand where the Court refused to grant defendant's Motion for an Order discharging the defendant when it did affirmatively appear, in violation of the speedy trial rule, that defendant was incarcerated and available for trial for a period of 450 days?"

Attached as Appendix I to Respondent's pleadings are copies of the briefs filed on behalf of Petitioner and the State of Florida in the Florida Supreme Court.

As observed in Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977), the court held:

> Federal courts review by habeas corpus errors of constitutional dimension. In this case, we are asked to examine a Florida procedural rule. Nowhere in the United States Constitution is there found a right to be brought to trial within 180 days. Although there is a right to a "speedy" trial found in the Sixth Amendment, this rights is "a more vague concept than other procedural rights." Barker v. Wingo, 407 U.S. 514, 521, 92 S.Ct. 2182, 2187, 33 L.Ed.2d 101 (1972). In Barker, the Supreme Court identified some of the factors to be considered in determining whether there had been a denial of speedy trial. Length of delay,

> the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant were the guidelines set by the court. Weighing all these factors, this Court is of the opinion that Davis has failed to establish a denial of his constitutional right to a speedy trial. While he may have shown a denial of the Florida guarantee to be tried in 180 days, if he could count on one state court of appeals rather than another, this is merely a violation of a state procedural rule which does not in any way go to the fundamental fairness of the trial. As such, it is not reviewable by the federal courts on a petition for habeas.
>
> [547 F.2d at 264]

Respondent would tender, therefore, that Petitioner has failed to raise a federal question as to whether Florida's Speedy Trial Rule was violated. Indeed, the Florida Supreme Court in reviewing this limited issue, concluded, as noted previously, that Petitioner's claims did not violate the Speedy Trial Rule in Florida.

Petitioner further asserts that he is entitled to relief because his constitutional speedy trial has been violated directing this Court's attention to the fact that the Florida Supreme Court failed to address the criteria set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). A review of Respondent's Appendix I quickly dispels any inquiry regarding why the Florida Supreme Court did not address said issue.

Petitioner has not raised before the trial or appellate courts of Florida, the issue of whether the delay of fifteen months violated his constitutional right to speedy trial. Pursuant to Cardinale v. Louisiana, supra, this Court has held:

> Questions not raised below are those on which the record is very likely to

> be inadequate, since it certainly was not compiled with those questions in mind, and in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of the constitutional challenge, since the statutes may be construed in a way which saves their constitutionality or the issue may be blocked by inadequate state ground. Even though states are not free to avoid constitutional issues on inadequate state grounds, (cite omitted) they should be given the first opportunity to consider them.
>
> In view of the Petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the state court to pass on this issue, the desirability of giving the state the first opportunity to apply its statute on an adequate record and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to Petitioner, the writ it dismissed for want of jurisdiction.

[394 U.S. at 439]

Assuming arguendo that Petitioner did present this issue before the Florida Supreme Court for review, Petitioner is still not entitled to relief. As noted by this Court in Barker v. Wingo, supra:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, defendant's assertion of his right, and prejudice to the defendant.
>
> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance . . .

[407 U.S. at 530]

In the instant cause, the delay from the time Petitioner was arrested, November 17, 1974, to the date of his trial, February 10, 1976, approximately fifteen months passed. Petitioner was indicted by the grand jury in Pasco County, Florida, on December 12, 1974, for two counts of murder in the first degree and on February 26, 1975, Petitioner filed a Motion to Suppress certain evidence. Said Motion was heard and granted March 17, 1975. On March 18, 1975, the State sought and the trial court granted a continuance in order that the State might take an interlocutory appeal based on the suppression order. Upon obtaining a reversal by the appellate court, mandate issued and was received by the trial court on November 6, 1975. On February 10, 1976, Petitioner was brought to trial.

A quick calculation of the time involved reveals that with the exception of the eight month delay occasioned by the State's interlocutory appeal from the granting of the Motion to Suppress filed by Petitioner, approximately six months of delay occurred. Certainly, the six month delay herein cannot even begin to compare with the five year delay occurring in Barker v. Wingo, supra. By any stretch of the imagination, one certainly cannot assume that this delay equates to a delay which is "presumptively prejudicial".

As to the other factors involved, this Court teaches in Barker v. Wingo, supra, no further inquiry is necessary. However, for the record, Respondent would submit that the reasons for the delay was because the State was entitled to take an interlocutory appeal regarding the granting by the trial court of Petitioner's Motion to Suppress physical evidence. There is nothing in this record, nor has Petitioner asserted that he in any way attempted to expedite the appeal taken by the State to the District

Court of Appeal in order to offset the delay in time that a normally prosecuted appeal takes. Moreover, while Petitioner asserts that he indeed objected to the continuing delay in the instant cause, his objections were predicated on the violation of the Speedy Trial Rule not the fact that irreparable harm was being done by the continuing delay in Petitioner's trial being held. Further, Petitioner's assertion that prejudice accrued to his cause by said delay is predicated on the fact that a delay occurred rather than any assertion that his witnesses no longer were available, his defense was impaired, or he was severely disadvantaged by the restraint on his liberty. As noted in Barker v. Wingo, supra:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic quality; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accuseds' interest in a speedy trial is specifically affirmed in the Constitution.
>
> [407 U.S. at 533]

In spite of the fact that a five year delay occurred in Barker v. Wingo, supra, this Court held:

> We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte. Nut barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant

> was denied his constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process rights to a speedy trial.
>
> [407 U.S. at 536]

Similarly, in the instant cause, Petitioner caused the delay when he filed his Motion to Suppress and said Motion was granted. The State of Florida at that point had a right as provided under Florida's Speedy Trial Rule to appeal via an interlocutory appeal said ruling and bring Petitioner to trial within a reasonable time thereafter. The record reflects that the trial court upon receiving mandate that reversed the order granting the Motion to Suppress brought Petitioner to trial within three months of said mandate. No speedy trial violation occurred sub judice.

CONCLUSION

Based on the authorities and arguments presented, Respondent would respectfully submit that with regard to the application of Florida's Speedy Trial Rule in the instant cause by the Florida Supreme Court, no federal question has been raised. Moreover, whether Petitioner was denied constitutional speedy trial was never raised before the Florida Supreme Court for appellate review, and therefore, pursuant to Cardinale v. Louisiana, supra, this Court should refrain from considering Petitioner's allegation that his contitutional speedy trial was violated. Finally, Petitioner has failed to meet any of the factors set forth in Barker v. Wingo, supra, with regard to whether a violation

of his constitutional speedy trial has occurred. On any and all of the grounds presented, Petitioner is not entitled to this Court's review.

Respectfully submitted:

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished GERALD GILLERMAN, Esquire, of Widett, Slater, & Goldman, 60 State Street, Boston, Massachusetts 02109 via United States mail on this 10th day of September, 1981.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

-of counsel-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 81-5169

APPENDIX I

Edwards Mangrove

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS,	:	
Appellant,	:	
-vs-	:	CASE NO. 49,345
STATE OF FLORIDA,	:	
Appellee.	:	

BRIEF OF APPELLANT

RECEIVED
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ATTORNEY GENERAL'S OFFICE

10-25-76
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the intervening holiday case

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS, :

Appellant, :

-vs- : CASE NO. 49-345

STATE OF FLORIDA, :

Appellee. :

BRIEF OF APPELLANT

All references in this Brief as to parties involved will be as designated in the Lower Court and will be as follows:

The Appellant, ELIGAAH ARDALLE JACOBS, will be referred to as the Defendant, and the STATE OF FLORIDA, Appellee, will be referred to as the State.

The references to the Records filed in this action will be as follows:

Transcript of Record, consisting of ten volumes, prepared by the Clerk of the Circuit Court of Pasco County, Florida, will be referred to as (Vol. _____, page _____).

It is also noted that pursuant to Motion of Defendant, the Clerk was required to provide a supplemental volume to said transcript that included a transcript of testimony taken on March 18, 1975, on a Motion by the State for a continuance. That said Motion was made on the mistaken belief that said testimony was not included in the original transcript. It was later discovered that said testimony was included in said transcript and, therefore, any reference to said testimony

will be by the original transcript commencing in (Vol. V, page 916).

STATEMENT OF THE CASE

That the Defendant was arrested on November 17, 1974, and charged with Murder in the First Degree, and was taken into custody (Vol. I, page 3). The advisory hearing occurred on November 18, 1974. (Vol. I, pages 4-5). That said Defendant at said advisory hearing, was deemed insolvent and LESTER BALES, JR. was appointed attorney to represent said Defendant.

That the Grand Jury in and for Pasco County, Florida, did on December 12, 1974, enter its Indictment for Murder in the First Degree against said Defendant on two charges (Vol. I, pages 1-2). That Defendants, THOMAS WILLIAM COLLINS and ELISHA JORDAN CHAVIS, were also indicted in said Indictment for the same offenses.

Defendant was arraigned on December 30, 1974, at which time a plea of not guilty was entered to both charges (Vol. I, page 200).

That Defendant filed his Motion to Suppress on February 26, 1975, (Vol. II, pages 243-244). That the Court granted Defendant's Motion to Suppress on March 31, 1975, (Vol. V, pages 744-745) resulting in an Interlocutory Appeal by the State, the Notice of Interlocutory Appeal being filed on April 4, 1975, (Vol. V, page 760). STATE v JACOBS, 320 So. 2nd 45, 2nd DCA (1975). That the State filed its Mandate in said Interlocutory Appeal on November 6, 1975, (Vol. V, pages 902-907). That pursuant to said Mandate the Honorable ROBERT L. WILLIAMS, Circuit Judge, filed his Finding of Facts (Vol. V, pages 909-910).

Commencing on February 10, 1976, a Jury Trial was held and on February 13, 1976, the Jury returned a verdict of guilty of Murder in the First Degree as to both offenses (Vol. IX, pages 1696-1697). That the Jury, following hearing on aggravating and mitigating circumstances, entered its recommendation that the Court sentence the Defendant to death on both counts (Vol. IX, pages 1720-1721).

That the Defendant filed his Notice of Appeal on April 9, 1976, Assignment of Errors, Directions to Clerk, Motion for the Court Reporter to transcribe notes, (Vol. VI, pages 976-982). That by Order of this Court entered on April 30, 1976, Defendant was again adjudged insolvent and LESTER BALES, JR. appointed attorney for said Defendant (Vol. VI, page 985).

STATEMENT OF FACTS

The facts in this case being that shortly before 7:00 A.M. on the morning of March 5, 1974, one EDWIN CHAUNCEY, the owner of a store known as Ed's Country Store, located on State Road 39 and County Line Road in Pasco County, Florida, was notified of trouble at the store and that two persons had been shot.

That EDWIN CHAUNCEY went immediately to the store, arriving there on or about 7:00 A.M. on said date, and discovered both victims, GRANT ISON and BARRY MARSH, apparently dead inside the store. EDWIN CHAUNCEY made a brief inventory of merchandise in the store and stated that beer, cigarettes, cash and one watch was missing. It appeared that GRANT ISON was a personal friend of EDWIN CHAUNCEY, acted as sort of a caretaker for said store, slept there all night and was permitted to drink whatever beer he desired while acting as such caretaker. The Pathologist, Dr. Shinner, who testified subsequently, indicated that both victims were probably under the influence of alcohol at the time of death. The witness Chauncey also stated that GRANT ISON had approximately $350.00 to $500.00 in cash on his person the night before, March 4, 1974, which money was missing on the morning of March 5, 1974.

That the Pasco County Sheriff's Department conducted an investigation of the offenses, discovered no weapons, finger prints or other physical evidence connecting either of the Defendants to the alleged offense.

That pursuant to the testimony of THOMAS WILLIAM COLLINS, brother-in-law of Defendant, (Vol. IX, pages 1418-1469) and the testimony of PAULA JEAN JACOBS, wife of Defendant, (Vol. IX, pages 1501-1562), it appears that on the evening of March 4, 1974, the Defendant, THOMAS WILLIAM COLLINS, the wife, PAULA JEAN JACOBS, and the friend of Defendant, ELISHA JORDAN CHAVIS, took a ride through Polk County, Hillsborough County, and arrived in Pasco County, the location of Ed's Country Store, sometime around 11:00 P.M. that evening.

That according to said witnesses, a plan had been agreed upon to rob Ed's Country Store and the vehicle owned and operated by THOMAS WILLIAM COLLINS pulled up to the gas pump and requested gasoline from GRANT ISON, the caretaker of the store. That the witness, PAULA JEAN JACOBS, proceeded to the ladies room where she said she heard a lot of sound like shooting and when she returned to the motor vehicle her husband, Jacobs, was placing some cigarettes in the vehicle and that later ELISHA JORDAN CHAVIS came out of the store. That during all this time THOMAS WILLIAM COLLINS was standing near the vehicle and did not enter the store. Witness PAULA JEAN JACOBS indicated that they immediately left Ed's Country Store and sometime later stopped and divided some money that Defendants Jacobs and Chavis had in their possession, witness Collins cannot recall this occurrence, then they proceeded to Defendant's home in Polk County where a division of beer and cigarettes taken from Ed's Country Store was made and the

parties separated. Witness PAULA JEAN JACOBS indicated that she and Defendant went to see K. W. TUCKER in Bartow, a friend of Defendant's, where Defendant paid Witness Tucker some money and asked him to apparently give some sort of an alibi should anybody inquire if he had seen Defendant that evening. Witness Tucker cannot recall such conversation or the date (Vol. IX, pages 1565-1567). 1567-8 He did remember

It further appears from the testimony of Defendant Collins and witness PAULA JEAN JACOBS, that all Defendants were indulging in intoxicating beverages of various types throughout the evening prior to the arrival at Ed's Country Store.

Between March 5, 1974, and November 18, 1974, Witness PAULA JEAN JACOBS and Defendant resided at their home in Mulberry, Florida, during which time the witness PAULA JEAN JACOBS indicates that she was guarded and continually watched by the Defendant and other persons. However, Witness PAULA JEAN JACOBS stated that she had an automobile for her own use, the Defendant did engage in his employment giving the witness PAULA JEAN JACOBS considerable time to herself. It then appears that the witness PAULA JEAN JACOBS, while Defendant was in the hospital, left Defendant, traveled to Massachusetts where she gave a statement to a Lt. Richard Coughlin of the Massachusetts State Police setting forth the details of the offense, which information was transmitted to the Pasco County Sheriff's Department and resulted in the arrest of the Defendant at the

Lakeland General Hospital on November 17, 1974.

An Indictment was returned and the Defendant subsequently convicted of both offenses as mentioned under the Statement of the Case.

ARGUMENT

QUESTION 1.

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT ADMITTED HEARSAY TESTIMONY ESTABLISHING ONE ELEMENT OF THE CORPUS DELICTI.

The Lower Court answered in the affirmative. This question was raised by Defendant's Assignment of Errors No. 1.

That during the questioning of Lt. Vogt of the Pasco County Sheriff's Department, the State was attempting to establish one element of the Corpus Delicti, namely the criminal agency of the Defendant involved in this matter, which clearly called for hearsay testimony (Vol. IX, pages 1404-1414). That from said portion of Lt. Vogt's testimony, it would appear that Lt. Vogt called a Sgt. Chiles of the Hillsborough County Sheriff's Department (Vol. IX, page 1404) who suggested that said witness call a Sgt. Keister of the Polk County Sheriff's Department (Vol. IX, page 1405) who suggested he call a Lt. Coughlin of the Massachusetts State Police, who in turn related to said witness what another witness, PAULA JEAN JACOBS, had told him involving Defendant in the criminal offense in question. All of these purported hearsay statements testified to by Lt. Vogt were pursuant to telephone conversations.

It also appears from the transcript of the record in this cause, that neither Sgt. Chiles or Sgt. Keister were called as witnesses and were not listed as such, but Lt. Coughlin was listed as a witness and not called, PAULA JEAN JACOBS was

listed as a State Witness and testified.

It is submitted that Florida aligns itself with states which permit evidence of out-of-court identification as not within the exclusion of the rule against hearsay but limits the use of such evidence to corroboration of other evidence of identity. In other words, the action of Lt. Vogt in securing information leading to the arrest of Defendant was based upon telephone conversations with three separate persons who did not appear at the trial and, of course, were not subject to cross examination. In WILLIS v STATE, 217 So. 2nd 106, the Florida Supreme Court confirmed this rule with respect to the evidence of out-of-court identification as announced in WILLIS but emphasized the necessity of the identifying witness being present in Court and subject to cross examination. This did not occur in the instant case, therefore, the testimony should not have been admitted.

The testimony upon which Defendant Jacobs was convicted was based solely on circumstantial evidence and alleged admissions of Defendant and the admission of the aforementioned double hearsay testimony of Lt. Vogt could be nothing more than prejudicial.

QUESTION 2.

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN INSTRUCTION ON INTOXICATION WHEN TESTIMONY CLEARLY INDICATED THE USE OF INTOXICATING BEVERAGES ON THE DATES AND TIME IN QUESTION AND WERE CLEARLY A MATTER TO BE CONSIDERED BY THE JURY.

The Lower Court answered in the affirmative. This question was raised by Defendant's Assignment of Errors No. 4.

At the trial of this cause, during the testimony of Co-Defendant and State Witness, THOMAS WILLIAM COLLINS, there was evidence presented showing use of intoxicating beverages not only on behalf of said witness but also on behalf of Defendant (Vol. IX, pages 1458-1460). Also, during the testimony of State Witness, JEAN FRANCIS GRAY, evidence was produced showing the indulgence of intoxicating beverages by Defendant (Vol. IX, pages 1476-1486-1487-1488-1489-1490-1495).

It is also important to note that during the testimony of State Witness, PAULA JEAN JACOBS, who is also the wife of Defendant and who was granted immunity in exchange for her testimony in this cause, reference is also made to the indulgence of intoxicating beverages by Defendant (Vol. IX, pages 1520-1531-1532-1548-1550).

In addition to the aforementioned State Witness testimony clearly indicating the use of intoxicating beverages, Defendant by his own testimony, admitted the use of such beverages (Vol. X, pages 1580-1581-1583-1584-1594-1600-1601).

At the charge conference (Vol. X, page 1609) a request was made by defense for the inclusion of a general instruction regarding intoxication, which instruction was denied. Again, at the conclusion of final arguments and out of the hearing of the Jury, defense again brought this matter to the attention of the Court to make sure the request and the denial of same in regard to the giving of instruction concerning intoxication was a matter of record (Vol. X, pages 1694-1695).

It must also be noted that during the testimony of State Witness and Pathologist, Dr. John Shinner, testimony was brought to the attention of the Jury, of an expert nature, concerning the effect of use of alcoholic beverages on the human body (Vol. VIII, pages 1316-1320). It is also noted that during testimony of State Witness, EDWIN DONALD CHAUNCEY, reference was made to the use of alcoholic beverages on behalf of the victims (Vol. VIII, page 1225).

Despite the abundant testimony of the use of alcoholic beverages by the Defendant and by State Witnesses, the State did object and the Court, agreeing with the State, did deny the request for a general instruction on intoxication.

It is submitted that in a prosecution for a crime involving a specific intent, and there is evidence of the Defendant's intoxication at the time of the commission of the offense, he is entitled to an instruction of the law applicable to the effect of intoxication on criminal liability BRYAN v STATE, 194 So. 385.

In LAYTHE v STATE, 330 So. 2nd 113, 3rd DCA (1976), there was evidence presented by the defense showing a withdrawal of Defendant's involvement in a crime prior to the death of the victim. During the trial the Trial Judge refused to instruct the Jury concerning the Defendant's theory of withdrawal. The Third District, in reversing the Lower Court, did indicate that Defendant is entitled to have the Jury instructed on the law applicable to his theory of defense if there is any evidence introduced to support the instruction, however disdainfully the Trial Judge may feel about the merits of such defense from a factual standpoint.

It is submitted that there is an abundance of evidence of use of intoxicating beverages presented in this cause, not only by the Defendant himself during his testimony, but by the State Witnesses who were also Co-Defendants. That for these reasons, Defendant was entitled to have the general instruction of intoxication given and the failure of the Trial Court to do so could do no more than prejudice the defense in this case.

QUESTION 3.

SHOULD JUDGMENTS OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE SAID JUDGMENTS WERE BASED UPON A VERDICT THAT IS CONTRARY TO THE LAW AND WEIGHT OF EVIDENCE PRODUCED.

The Lower Court answered in the affirmative. This question was raised by the Defendant's Assignment of Errors No. 6.

The conviction of Defendant in this matter was based solely upon circumstantial evidence, there being no direct evidence presented against the Defendant, plus the alleged admissions of Defendant made while in an apparent intoxicated condition. It is also submitted that there is no direct evidence showing that the Defendant committed either of the offenses alleged, which together with the complete lack of physical evidence in this case renders this case extremely flimsy to substantiate a conviction of Murder in the First Degree.

It is also noted that the State's chief witnesses consisted of a wife, PAULA JEAN JACOBS, who was granted immunity, and his brother-in-law, THOMAS WILLIAM COLLINS, who through plea bargaining was permitted to plead to a Second Degree on each charge and received a five year sentence to run concurrently and with a recommendation that same be served at a State Institution other than Raiford State Prison (Vol. VI, pages 954-955).

It is also noted that Co-Defendant, ELISHA JORDAN CHAVIS

was permitted to plead guilty to Murder in the Second Degree in both offenses and received life sentences in both cases to run consecutively (Vol. VI, pages 957-958).

During the closing arguments of the trial in the aforementioned matter, during summation by defense counsel (Vol. X, page 1662) the following occurred, the excerpt from said closing statement and objections by the State, ruling by the Court being as follows:

> "Now we had four people we could charge for this, now we're going to let the wife off, we let her off, we let the brother-in-law off with a reduced sentence, and apparently let the other man off with a reduced sentence -- (interrupted)
>
> MR. WEBB: Your Honor, I'm going to object to Mr. Bales' comment. That's not in evidence.
>
> THE COURT: Very well, objection sustained.
>
> MR. WEBB: I ask it be stricken and the Jury instructed to disregard it.
>
> THE COURT: It will be stricken and the Jury is instructed to disregard the last statement of counsel."

There is no question in this matter that the verdicts and judgment is clearly not equal justice under the law as in SLATER v STATE, 316 So. 2nd 539 (1975), the Court indicated that Co-Defendants should not be treated differently on the same or similar facts.

As the Court will recall in Slater three persons were involved in a robbery and murder of a motel manager in Orlando, Florida.

One Defendant pleaded Nolo Contendre and was sentenced

to life imprisonment, one Defendant was permitted to plead guilty to robbery, was given five years imprisonment, and the third Defendant, Slater, was found guilty and the Court over-ruling the Jury on an advisory sentence, entered the death sentence against Slater. Also in SLATER the death sentence was reduced to life imprisonment.

Another very important fact in this matter was the objection and ruling by the Court striking the question concerning the involvement of the Co-Defendant Chavis in this matter. It was the opinion of defense counsel that the Jury was entitled to know that Co-Defendant Chavis, through plea bargaining, had been permitted to plead guilty to a lesser offense. In MUSSER v STATE, 320 So. 2nd 137 (1976) it was noted that during the sentencing portion of the trial, the Appellant was not permitted to submit evidence of plea bargaining and the entrance of a reduced sentence against the Co-Defendant. This Court, in again citing SLATER stated that Defendant should not be treated differently upon the same or similar facts and that the Jury should have had the benefits of the consequences suffered by the accomplice at arriving at its recommendation of the sentence to be visited upon the Appellant.

It is, therefore, again respectfully submitted that the verdict and judgment entered in this cause was not equal justice under the law and that the same should not be permitted to stand.

927-928

995-998

QUESTION 4.

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION TO QUASH THE INDICTMENT WHEN IT CLEARLY APPEARED THAT ONE MEMBER OF THE GRAND JURY ISSUING SAID INDICTMENT WAS NOT QUALIFIED AS SUCH GRAND JUROR UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

The lower Court answered in the affirmative. This question was raised by Defendant's Assignment of Errors No. 7.

It affirmatively appeared from the records in this cause that one JIMMIE MARIE BROOKS, also known as JIMMIE MARIE McCALL, was a member of the Grand Jury who issued the Indictment in this cause on December 12, 1974, (Vol. I, pages 1-2).

It is also respectfully submitted that under Section 40.01, Florida Statutes (1973), a Grand Juror, in order to be qualified as such, has to be a qualified elector in their respective county. Under Article VI, Section 2, Florida Constitution, to be a qualified elector, it is required that a person be registered to vote in the county of residence.

Defendant filed his Motion to Quash the Indictment in this matter (Vol. V, pages 936-937) based upon the Affidavit of the Supervisor of Elections which showed that the said JIMMIE MARIE BROOKS was not a qualified elector on December 12, 1974, the date of the issuance of the Indictment in this cause. As stated in KITROL v STATE, 9 Fla. 9 (1860) a Grand Jury must consist of men possessing the qualifications prescribed by Statute and one incompetent Grand Juror will render

an Indictment void.

It is, therefore, respectfully submitted in this matter that pursuant to the records of the Supervisor of Elections of Pasco County, Florida, the aforementioned member of the Grand Jury was not a qualified elector of Pasco County, Florida, and therefore the Indictment issued was void.

QUESTION 5.

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN ORDER DISCHARGING THE DEFENDANT WHEN IT DID AFFIRMATIVELY APPEAR, IN VIOLATION OF SPEEDY TRIAL RULE, THAT DEFENDANT WAS INCARCERATED AND AVAILABLE FOR TRIAL FOR A PERIOD OF 450 DAYS.

The Lower Court answered in the affirmative. This question was raised by Defendant's Assignment of Errors No. 8.

As the record reflects in this cause, Defendant ELIGAAH ARDALLE JACOBS, was taken into custody on November 17, 1974, (Vol. I, page 3), the trial in this cause commencing on February 10, 1976, (Vol. V, page 913), or the number of 450 days between the arrest and trial. That it is also shown by the complete record in this cause that Defendant was continually available for said trial since the November 17, 1974, date.

That the first trial in this matter was scheduled for March 18, 1975.

On February 26, 1975, Defendant Jacobs filed a Motion to Suppress certain evidence (Vol. II, page 243) and that pursuant to a hearing held on March 17, 1975, said Motion to Suppress was granted (Vol. IV, page 677), said Order being the subject matter of an Order entered on March 25, 1975, (Vol. V, page 744). That on the date of the trial March 18, 1975, State filed a Motion for Extension of Time or Continuance of Trial under Speedy Trial Rule, Rule 3.191 (f) F.R.C.P. That at a

hearing held on March 18, 1975, on the State's Motion for a Continuance of the trial date, the State did represent to the Trial Court that it intended to take an Interlocutory Appeal from the Order suppressing evidence, that the State Attorney's Office, through Assistant State Attorney Yon, would personally prosecute the appeal (Vol. V, page 917) and that a maximum of sixty days, or a lesser number of days, would be necessary to complete said Interlocutory Appeal (Vol. V, page 918). That pursuant to said Motion and representation by the State, the Court did enter an Order granting the continuance as requested (Vol. IV, page 680).

That although the State represented to the Court that it would give its immediate attention to the prosecution of the Interlocutory Appeal, the Notice of said Interlocutory Appeal was not filed until April 4, 1975, (Vol. V, page 760), together with the other appeal documents. That immediately after filing the appeal documents, the State filed a Motion for an Extension of Time requesting an additional thirty days for preparation of a Brief, resulting in an Order of Court granting a total of forty-five days from the filing of the Notice of Interlocutory Appeal to the filing of the Brief (Vol. V, page 766).

By Motion filed April 16, 1975, the State again moved for an extension of time for trial in order to prosecute the Interlocutory Appeal (Vol. V, page 768). Defendant Jacobs objected to such continuance (Vol. V, page 769) but that by Court Order (Vol. V, page 770) the period of time during which said

Defendant must be brought to trial was extended for a thirty day period commencing May 16, 1975, meaning that under the Court's Order of April 16, 1975, Defendant had to be brought to trial by June 16, 1975. That by Motion filed June 6, 1975, (Vol. V, page 794) the State again, by the State Attorney's Office, moved for an extension of time for trial resulting in another Order of the Court extending the trial date for a reasonable period after the Second District Court of Appeals filed its Opinion on the State's Interlocutory Appeal (Vol. V, page 795). That although the State Attorney's Office, during the hearing of March 18, 1975, (Vol. V, page 918) had represented it would prosecute the Interlocutory Appeal, it appears that the matter was immediately turned over to the Attorney General's Office, who filed the Brief for the State and represented the State in oral argument before the Second District Court of Appeals.

That by action of the State Attorney's Office in open Court on July 22, 1975, (Vol. V, page 883), the trial in the aforementioned matter was reset for August 26, 1975. That as shown by the Affidavit of the attorney for Defendant Jacobs, immediately upon receiving Notice of Trial, he did contact State Attorney's Office and in a personal conversation with Assistant State Attorney Phillip Van Allen, said defense attorney was advised that a decision had been made to go to trial without the evidence suppressed by this Court's Order at which time attorney for Defendant Jacobs advised said Assistant State

Attorney Van Allen that defense was ready for trial as set forth in Affidavit of defense counsel (Vol. V, page 884).

That Defendant would further show that upon receipt of the Notice of Trial and being advised by the State Attorney's Office that said trial would be held on August 26, 1975, Defendant immediately filed a Motion in the Second District Court of Appeals for dismissal of the State's Interlocutory Appeal on the basis of abandonment. On August 19, 1975, the State, through the State Attorney's Office, filed another Motion for Continuance (Vol. V, page 888), said Motion and supporting Affidavit (Vol. V, page 887), indicating that an error had been made by the State Attorney's Office in securing the trial date of August 26, 1975. That upon hearing on the State's Motion an Order was entered removing said case against Defendant Jacobs from the Trial Docket (Vol. V, page 893), but that said Order did not extend the trial date. That no further Order was entered by the Court extending the trial date in this matter.

There is no question that all of the continuances sought and secured by the State in this case were secured under the exceptional circumstances provision of Rule 3.191 (f) F.R.C.P. (Vol. IV, page 678). It is also well established by Florida Law that in such instances an express order of the court is required in order to toll the Speedy Trial period of 180 days which in the instant case did expire on May 26, 1975, MULLIN v STATE, App. 1974, 307 So. 2nd 829. It is again noted that the special circumstances alleged by the State in its first Motion for Ex-

tension (Vol. IV, page 678) was for the purpose of prosecuting an Interlocutory Appeal and the record clearly indicates there was only one valid continuance and that being for a period of sixty days from March 18, 1975, expiring on May 18, 1975.

As aforementioned, the State filed its Notice of Interlocutory Appeal on April 3, 1975, (Vol. V, page 760) and it would, therefore, appear that the filing of said Notice of Interlocutory Appeal gave the Second District Court of Appeals full jurisdiction of the parties and subject matter of said action, Rule 3.2 (d), Fla. App. Rules. It would also appear that under Rule 6.61, Fla. App. Rules, that before the Record on Appeal was filed in the Second District Court of Appeals, the Lower Court could fix extension of time, etc., which applies to those certain ministerial functions concerning extensions for filing a Clerk's Record, Court Reporter's Record and Briefs of the parties. That under the interpretation of either of said Rules, it would appear that the Lower Court retains no jurisdiction for the entrance of any order extending time for trial subsequent to the March 18, 1975, Order. STATE OF FLORIDA v THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, 187 So. 2nd 890.

In Summary to this point of the argument, it would appear that the State requesting continuance of the trial date based upon the exceptional circumstances of prosecuting an Interlocutory Appeal did not perform pursuant to its representation to the Lower Court in concluding said matter within a sixty day period. In fact it would appear that the State

Attorney's Office immediately turned the matter of appeal over to the Attorney General's Office and subsequently thereto merely participated in procuring the continuances reflected throughout the trial record. In the instant case we would again state that the extension of time could not be interpreted to exceed May 18, 1975. Appellate Courts have placed a very strict interpretation upon this Rule concerning speedy trials, STATE v JONES, 332 So. 2nd 699 (Fla. 1st DCA, 1976), and the Defendant Jacobs who has been incarcerated and available for trial since November 17, 1974, was clearly entitled to a speedy trial no later than May 26, 1975, unless a valid continuance had been awarded under the aforementioned Rule.

Again, in summary, we would state that the facts clearly show that the Defendant was incarcerated and available for trial for a period of 450 days and that the only valid extension of time granted in this matter was a sixty days extension of time entered on March 18, 1975. That further attempts to secure extension of trial date by the State were not effective for that purpose. The State failed to live up to its representations and, therefore, the Defendant should be discharged.

CONCLUSION

It is, therefore, respectfully submitted that this Honorable Court should, upon consideration of this appeal, enter its Order either:

1. Directing the immediate discharge of Defendant for failure of the State to provide a speedy trial, or

2. Enter its Order reversing the judgment and sentence of the Circuit Court of Pasco County, Florida.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS, :

Appellant, :

-vs- : CASE NO. 49,345

STATE OF FLORIDA, :

Appellee. :

CERTIFICATE OF SERVICE

I, LESTER BALES, JR., Attorney for Appellant, do, hereby, certify that a true copy of the Brief of Appellant has been furnished by regular U. S. Mail to the Honorable ROBERT L. SHEVIN, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32304, this 21 day of October, 1976.

Lester Bales, Jr.
Attorney for Appellant
P. O. Box 1445
Zephyrhills, Florida 33599

IN THE SUPREME COURT OF FLORIDA

ELIGAAH ARDALLE JACOBS,	§	
Appellant,	§	
-vs-	§	CASE NO. 49,345
STATE OF FLORIDA,	§	
Appellee.	§	

11-15-76

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF FLORIDA

ELIGAAH ARDALLE JACOBS,	§	
Appellant,	§	
-vs-	§	CASE NO. 49,345
STATE OF FLORIDA,	§	
Appellee.	§	

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant was defendant in the Circuit Court in and for Pasco County, Florida. Appellee was the prosecution. The parties will be referred to as they appear before this Court.

"R" will be used to designate the record on appeal herein.

STATEMENT OF THE CASE

Appellee will accept Appellant's statement of the case, but would note that the trial court's findings in support of the death penalties are at (R-969-970).

STATEMENT OF THE FACTS

Appellant's statement of the facts is reasonably accurate, but Appellee would note that:

Appellant's assertion at page 5 that Ison had $350-to-$500 is unsupported. Witness Channey knew he had $170-(R-1217), and thought he had at least $400-(R-1229)

Also on page 5, Appellant says nothing was found at the scene to link any defendant to the offense. This is not supported by the record. However, the record does show that no evidence of that nature was introduced at trial.

Contrary to Appellant's claim on page 6, witness Collins did recall stopping and getting some of the money. (R-1430-1431) Contrary to his claim on pages 7, witness Tucker did recall Appellant's effort to establish an alibi through him. (R-1567-1568)

POINTS INVOLVED

POINT I

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT ADMITTED HEARSAY TESTIMONY ESTABLISHING ONE ELEMENT OF THE CORPUS DELICTI.

POINT II

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN INSTRUCTION ON INTOXICATION WHEN TESTIMONY CLEARLY INDICATED THE USE OF INTOXICATING BEVERAGES ON THE DATES AND TIME IN QUESTION AND WERE CLEARLY A MATTER TO BE CONSIDERED BY THE JURY.

POINT III

SHOULD JUDGMENTS OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE SAID JUDGMENTS WERE BASED UPON A VERDICT THAT IS CONTRARY TO THE LAW AND WEIGHT OF EVIDENCE PRODUCED.

POINT IV

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION TO QUASH THE INDICTMENT WHEN IT CLEARLY APPEARED THAT ONE MEMBER OF THE GRAND JURY ISSUING SAID INDICTMENT WAS NOT QUALIFIED AS SUCH GRAND JUROR UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

POINT V

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN ORDER DISCHARGING THE DEFENDANT WHEN IT DID AFFIRMATIVELY APPEAR, IN VIOLATION OF SPEEDY TRIAL RULE, THAT DEFENDANT WAS INCARCERATED AND AVAILABLE FOR TRIAL FOR A PERIOD OF 450 DAYS.

POINT I

A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND WHERE THE COURT ADMITS EVIDENCE THAT APPELLANT WAS ARRESTED AFTER UNDISCLOSED CONVERSATIONS WITH OTHERS.

A R G U M E N T

Appellant says the Court admitted hearsay to establish his criminal agency, but a careful review of (R-1404-1411), reveals that the witness did not reveal the subtance of any conversation. All he did was to say he had the conversation, then arrested Appellant. That is neither hearsay nor proof of Appellant's criminal agency. As this Court said in Collins v. State, 65 So.2d 61 at 67 (Fla. 1953):

> "* * * An officer may say what he did pursuant to information but he may not relate the information itself for such is hearsay * * *." at 67

POINT II

JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN INSTRUCTION ON INTOXICATION WHEN TESTIMONY INDICATED THE USE OF INTOXICATING BEVERAGES ON THE DATES AND TIME IN QUESTION.

A R G U M E N T

Appellant asked for and was refused a general instruction on intoxication. (R-1609, 1694-95) To support his request he cites every mention of drinking in the evidence.

How the evidence that the victims were drinking can require an instruction on the effect of intoxication on Appellant eludes this writer. Nor is the testimony of Jean Gray or most of that of Paula Jacobs pertinent, since they testified as to his condition in May when he bragged of what he did, not his condition in March during the killings. All that remains is Collins' testimony that Appellant was drinking an unspecified quantity of beer, and had passed the liquor bottle in the car (R-1459, 1460), a brief reference by Paula Jacobs that the men were drinking an unspecified amount (R-1531, 1532), and Appellant's testimony that he was at home that night drinking, and could not possibly have left home and committed the murders. (R-1580-1585)

Appellant relies on Bryan v. State, 194 So. 385,

141 Fla. 676 (1940), which holds that it is not error to give such a charge in a proper case, but does not require the charge. The case is illustrative of the type of evidence which will justify an instruction on intoxication. The court said:

> "* * * There was substantial evidence that the defendant had been drinking intoxicating liquor during the night on which the homicide occurred. He was operating what is described by the witness as a beer garden and dance hall. The homicide occurred sometime about midnight or probably a little later. The testimony given by the defendant as a witness in his own behalf was vague and uncertain. There were a great many circumstances which he did not remember and others which he could not fully explain. From the testimony showing that he had been drinking and his own testimony showing that he did not have any clear recollection of just what happened at about the time the homicide occurred, the jury could reasonably have drawn the conclusion that his mind was clouded by the effects of intoxicating liquor * * *." at 386

It is respectfully submitted that there was no evidence in the instant case from the jury could reasonably have inferred that these offenses were done in a state of mind so intoxicated as to negative specific intent. No witness, including Appellant, asserted that he was intoxicated in anyway. There is not even evidence of any specific quantity of alcohol consumed during the several hours Appellant drove around before the robbery.

What the evidence does show is that the robbery and the killing of the victims to leave no witnesses was carefully

planned in advance by Chavis and the Appellant.(R-1509) And, unlike Bryan, Appellant did not claim to be unable to remember what he did that night. He was emphatic that he did not leave home and could not have been the killer.(R-1585)

Thus, it appears that this case is controlled by Shaw v. State, 228 So.2d 619 (Fla. 2d DCA 1969), where the Court held that a requested instruction on intoxication was properly refused on the evidence that Shaw recalled with remarkable clarity all events leading up to the offense. Further, the method in which these homicideswere carried out belie any incapacity to form specific intent. Accordingly, intent can be presumed from this evidence of premeditated robbery and elimination of witnesses, so that the instruction was properly refused upon authority of Askew v. State, 118 So.2d 219 (Fla. 1960).

The issue for the jury here was not whether Appellant was too drunk to know what he did -- no such claim was made below and no basis appears in the record. The issue was whether Appellant was present at the scene, committing cold-blooded, calculated robbery and witness elimination, as his accomplices claim, or whether he was home drinking and nowhere near the scene, as he claimed. It is respectfully submitted that this is an alibi case, not an intoxication case, and the requested instruction was properly refused.

POINT III

JUDGMENTS OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND AS THE VERDICTS ARE FULLY SUPPORTED BY THE EVIDENCE.

A R G U M E N T

Appellant speaks of flimsy, circumstantial evidence, but to do so he must disregard the State's case. Though there were no eyewitnesses to the shooting, there was direct evidence from accomplices who heard the shots and saw Appellant inside and coming out with the stolen goods. They heard him planning both the robbery and the killing beforehand, and heard him seek to establish an alibi after. This may be accomplice case, but it is certainly not a circumstantial case.

Appellant also belittles his own statement of what he did, claiming he was drunk when he said it. However, the evidence is that he was sober when he said it (R-1495), and though he had several drinks thereafter, he was still only half intoxicated (R-1490), probably because after a sip of each he threw the rest in his wife's face.(R-1488-1489)

Appellant's principal complaint is unequal treatment of his accomplices. He mentions his effort to bring up Chavis in his closing argument (R-1662), but Appellant can find nothing which had been placed before the jury at that time to support

his argument. The court was clearly correct in sustaining the State's objection.

Appellee will concede that codefendants should be treated equally on the same or similar facts. Slater v. State, 316 So.2d 539 (Fla. 1975). But different sentences may be justified where there is a basis for distinquishing the acts of the defendants, Douglas Ray Meeks v. State, Case No. 47,533, Opinion of this Court filed October 28, 1976 (see page 9).

Viewed in this light, Appellant clearly has no cause to complain of the disposition of his wife and witness Collins. Neither entered the store nor shot anyone. His wife testified that she went along only because she was scared of him.(R-1536-1537) And she testified that Collins was unwilling to kill the victims just to eliminate witnesses.(R-1509)

The record shows that Chavis plead to murder in the second degree and was sentenced to life in prison on each count. It does show that he was willing to kill the victims (R-1509), and did in fact shoot one. Aside from that, the record is silent as to whether he did either of the following, both of which Appellant did:

1) threatened potential witnesses against him with death if they talked (see R-1460-1462, 1478, 1479, 1523, 1524, 1549, 1560), and Sawyer v. State, 313 So.2d 680 (Fla. 1975).

2) attempted to cover up the offense by phony alibi.(R-1518)

It is clear that Chavis' victim died at once, while Appellant's

lingered for as much as an hour, which makes Appellant's personal act of homicide more heinous (see e.g., Halliwell v. State, 323 So.2d 557 (Fla. 1975). It is also clear from Appellant's statement that he initially shot his victim for fear the man had a gun, but continued shooting even though the victim raised his hands and pleaded for mercy.(R-1514) Chavis shot only when the other victim attacked Appellant.(R-1430)

Appellee suggests that Appellant is distinguishable from his codefendants by the presence of additional aggravating circumstances not shown to be present as to the others. Appellee further would note that there is no indication of any statement by Chavis like that Appellant made. This Court should not ignore the likely difficulty in trying Chavis with no confession, and testimony only from accomplices who were not inside the store. That the prosecutor thought less of his chances to obtain death sentences in Chavis' case should not diminish in anyway the fact that Appellant's acts fully warrant the punishment imposed.

POINT IV

JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND EVEN THOUGH ONE MEMBER OF THE GRAND JURY HAS BEEN PURGED FROM THE VOTER LIST BEFORE THE INDICTMENT ISSUED.

A R G U M E N T

It is hardly clear from the record that Appellant proved the allegations of his motion to quash the indictment. (R-936-937) Certainly, the affidavit of the Supervisor of Elections could have been objected to for lack of cross-examination. (R-927-928)

Also, it is hardly clear that the motion was timely filed, since it came long after the thirty days allowed at arraignment for filing motions. (R-200) See Fla.R.Crim.P. 3.190(c).

Nonetheless, it appears that all parties agreed, or did not dispute at the hearing on the motion (R-995-999), that a grand juror had been on the voter list when that list was submitted to the County Commission, but subsequently purged for not voting. (R-996-997) The trial judge denied the motion, specifically adopting findings of fact and conclusions from a similar case. (R-999) Appellant has neglected to bring the findings and conclusion thus adopted forward for this Court's consideration.

The practical effect of accepting Appellant's argument would be to impose an intolerable burden on lower courts. Court personnel would have to check daily to be sure no juror or grand juror had been purged that day. But such a result is neither desirable nor legally required.

There are cases which hold that a single disqualified grand juror will vitiate an indictment. But each case involves an actual or alleged disqualification of substance. Kitrol v. State, 9 Fla. 9 (1360), involved an alleged overaged juror. In Lindsay v. State, 97 Fla. 701, 122 So. 1 (1929), a deputy sheriff Feigned resignation so he could serve as a grand juror. Hicks v. State, 97 Fla. 199, 120 So. 330 (1929), involved a substitution by the sheriff of a person not selected for the grand jury to replace one who was Cotton v. State, 85 Fla. 197, 95 So. 668 (1923), contained an allegation that a grand juror was not a resident.

Appellee can not understand how the purging of the juror from the voting list renders her any less a qualified elector. Her qualifications do not change, and she has only to re-register to be restored. Appellee would have this Court distinguish this case from those recited above because this case involves no alleged defect in substantive qualification. If this Court is unwilling to do that, it should nonetheless affirm this case, since it appears the juror was qualified when her name was drawn. In Bryson v. State, 211 So.2d 246 (Fla. 3d DCA 1968), cert.den. 218 So.2d 173, the court held that a jury list which was valid when drawn would not become

illegal just because the method of selecting veniremen changed later in the year. The same reasoning should be applied to this juror.

POINT V

A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES SHOULD BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN ORDER DISCHARGING THE DEFENDANT WHEN IT DID AFFIRMATIVELY APPEAR, IN VIOLATION OF SPEEDY TRIAL RULE, THAT DEFENDANT WAS INCARCERATED AND AVAILABLE FOR TRIAL FOR A PERIOD OF 450 DAYS.

A R G U M E N T

Appellant recognizes that the State's interlocutory appeal was filed April 4, 1975 (R-760), and mandate thereon was not returned until November 6, 1975. (R-902) He also recognizes an initial order tolling the time for speedy trial (R-680), and diverse subsequent orders to the same effect. (R-770, 795) The last order extended the time to a reasonable time after the mandate of the appellate court might be received.

Appellant argues that only one 60 day extension was validly granted, since the court lacked jurisdiction thereafter because of the pending appeal. Appellant overlooks that the initial extension was not limited to 60 days. The Court expressly declined to thus limit the appellate court (R-918), and neither the motion (R-673), nor the order (R-680), is so limited.

Appellant is also mistaken in arguing that the lower court lost jurisdiction to extend the time after the notice of

appeal was filed. Fla.R.Crim.P. 3.191(d)(2), is clear in this regard:

> "When Time May Be Extended. The periods of time established by this Rule for trial may at any time be waived or extended by order of the court (i) upon stiputation, signed in proper person or by counsel, by the party against whom the stipulation is sought to be enforced, provided the period of time sought to be extended has not expired at the time of signing, or (ii) on the court's own motion or motion by either party in exceptional circumstances as hereafter defined, or (iii) with good cause shown by the accused upon waiver by him or on his behalf, or (iv) a period of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency or physical ability of the defendant to stand trial, for hearings on pre-trial motions, for interlocutory appeals, and for trial of other pending criminal charges against the accused. For the purposes of this Rule, any other delay shall be unexcused." (emphasis added)

Any notion that a trial court loses jurisdiction to stay proceedings would be contrary to Fla.App.Rule 5.1, which clearly contemplates that supersedeas may be obtained after the appeal is filed, and Fla.App.Rule 6.15(a) which does not even allow bail in criminal appeals until after the notice of appeal is filed.

Appellee submits that the orders below were fully effective to properly extend the speedy trial time, so that Appellant's argument is without merit. Appellee would also suggest that the appeal pursuant to Section 924.071, Fla.Stat. automatically stays proceedings, just as the statute provides.

Though cases such as Mullin v. State, 307 So.2d 829 (Fla. 3d DCA 1975), and State v. Cannon, 332 So.2d 127 (Fla. 4 DCA 1976), have required an order of extension, Appellee submits that the better view is stated in State v. Pearce, 336 So.2d 1274 (Fla. 1 DCA 1976), which effectuates the tolling provision but leaves it open to the defendant to show lack of good faith attending the appeal.

That the appeal here was meritorious is clear from the fact that it produced a reversal. Though Appellant does claim the State did not live up to its promises as to time sequences and personal handling, he can not and does not point to any delay in the handling of the appeal.

It is respectfully submitted that the motion for discharge was properly denied.

CONCLUSION

It is respectfully submitted that Appellant has failed to demonstrate reversible error in the judgments of guilt or the sentences to death. The judgments and sentences are richly deserved for the crimes committed, and should be severally affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been furnished Lester Bales, Jr., Esquire, Attorney at Law, Post Office Box 1448, Titusville, FL 33599, via Mail, this 15th day of November, 1976.

Charles W. Musgrove

CHARLES W. MUSGROVE
Assistant Attorney General

OF COUNSEL FOR APPELLEE

C

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS,	:	
Appellant,	:	
-vs-	:	CASE NO. 49,345
STATE OF FLORIDA,	:	
Appellee.	:	

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Inasmuch as the Appellant in his Brief, referred to himself as the Defendant instead of Appellant, and to the State of Florida as the State instead of Appellee, the same designations will be used in this Reply Brief.

For convenience of the Court we will still refer to the Transcript of Record as (Vol. ____, page ____).

STATEMENT OF THE CASE

The parties are apparently in substantial agreement as to the Statement of the Case.

STATEMENT OF FACTS

The parties are also in agreement as to the Statement of Facts contained in Defendant's Brief, with minor discrepancies.

ARGUMENT

QUESTION 1.

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT ADMITTED HEARSAY TESTIMONY ESTABLISHING ONE ELEMENT OF THE CORPUS DELICTI.

The State chooses to ignore the Defendant's argument on this question, namely, that such statements made by the witness based upon hearsay information, required that the identifying witness be present in Court as set forth in WILLIS v STATE, 217 So. 2nd 106.

In (Vol. IX, pages 1404, 1405, 1406) repeatedly the witness Vogt, a police officer, was asked questions by the State which were solely for the purpose of eliciting testimony from the witness as to conversations with third persons who did not appear at the trial and we would again state that WILLIS governs in this situation and that said testimony was prejudicial to Defendant.

QUESTION 2.

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN INSTRUCTION ON INTOXICATION WHEN TESTIMONY CLEARLY INDICATED THE USE OF INTOXICATING BEVERAGES ON THE DATES AND TIME IN QUESTION AND WERE CLEARLY A MATTER TO BE CONSIDERED BY THE JURY.

The State apparently admits that alcoholic beverages were used by both the Defendant and Co-Defendants in this matter but claims that the Jury was not entitled to receive any type of an instruction concerning intoxication.

As stated in the Defendant's Brief, there are numerous incidents of the use of intoxicating beverages by the Defendant and Co-Defendants. The thrust behind Defendant's argument as to this question was that the Jury, based upon the testimony produced before the Court relating to the use of alcoholic beverages, was entitled to receive a general instruction concerning intoxication. The State, in response to Defendant's argument, chooses to argue the effectiveness of such testimony and states as a basis for denying such requested information, that there was no proof as to the quantity of alcoholic beverages consumed. In (Vol. IX, page 1584), Defendant indicates that he drank about a half quart of vodka and a six pack of beer and also testified that when he drinks he goes to sleep (Vol. X, page 1601).

In support of its argument, the State in its Appellee's Brief, citing SHAW v STATE, 228 So. 619 (Fla. 2nd DCA, 1969)

wherein the Court denied a requested instruction on intoxication, it is stated that the Defendant Shaw "recalled" with remarkable clarity, all events leading up to the offense which, of course, is not the situation from evidence produced at the trial in this cause.

Again, as stated in LAYTHE v STATE, 330 So. 2nd 113, 3rd DCA (1976), the Defendant was entitled to have the Jury instructed on the law applicable to intoxication if there was any evidence produced to support the instruction. In the instant case there was more than ample testimony presented both by the Defendant and the State's witness to show the use of intoxicating beverages requiring the Jury be instructed in this regard.

QUESTION 3.

SHOULD JUDGMENTS OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE SAID JUDGMENTS WERE BASED UPON A VERDICT THAT IS CONTRARY TO THE LAW AND WEIGHT OF EVIDENCE PRODUCED.

The State again overlooks, or chooses to ignore, the purpose of Defendant's argument in this regard, namely, that the Court committed error in refusing to permit the Jury to know the Sentence received by a Co-Defendant (Vol. X, page 1662).

There is no question that the participation of the Defendant Chavis in the offenses charged was fully before the Jury both by testimony of State Witnesses and by the Defendant. The Jury was entitled to know what happened to Chavis. Therefore, under SLATER v STATE, 316 So. 2nd 539 (1975), it does appear that the verdicts and judgment in this case does not constitute equal justice under the law, MESSER v STATE, 320 So. 2nd 137 (1976).

QUESTION 4.

SHOULD JUDGMENTS OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION TO QUASH THE INDICTMENT WHEN IT CLEARLY APPEARED THAT ONE MEMBER OF THE GRAND JURY ISSUING SAID INDICTMENT WAS NOT QUALIFIED AS SUCH GRAND JUROR UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

The State in its argument on this question apparently admits that an unqualified Grand Juror was serving on the Grand Jury who issued the Indictment in this cause but further argues that purging of a Juror from the voting list is insufficient grounds to declare such a Grand Juror as unqualified.

Defendant would merely again state that under Article VI, Section 2, Florida Constitution, the requirements to be a qualified elector are set forth. That under Section 40.01, Florida Statutes (1973), a Grand Juror, in order to be qualified as such, has to be a qualified elector. The Grand Juror in question did not meet such qualifications and the Indictment should have been quashed.

QUESTION 5.

SHOULD A JUDGMENT OF GUILTY OF MURDER IN THE FIRST DEGREE ON TWO CHARGES OF HOMICIDE AND TWO DEATH SENTENCES BE ALLOWED TO STAND WHERE THE COURT REFUSED TO GRANT DEFENSE MOTION FOR AN ORDER DISCHARGING THE DEFENDANT WHEN IT DID AFFIRMATIVELY APPEAR, IN VIOLATION OF SPEEDY TRIAL RULE, THAT DEFENDANT WAS INCARCERATED AND AVAILABLE FOR TRIAL FOR A PERIOD of 450 DAYS.

In its argument on this question the State does indicate that the Interlocutory Appeal was meritorious inasmuch as it did produce a reversal and we would submit that the record clearly shows in this cause that the case was remanded only for finding of fact, which upheld the Defendant's position in this matter (Vol. V, page 909). It is also noted that the State argues that the first order of this Court expressly declined to limit the time of the extension. Attention is called to the fact that the State's Motion resulting in said Order (Vol. IV, page 678) was pursuant to Rule 3.191 (f) F.R.C.P. and not under Rule 3.191 (d) (2) F.R.C.P. as referred to in the State's argument. The subsequent actions by the State in requesting additional continuances, would verify the fact that it was fully aware of the fact that only a sixty day extension had been awarded in this regard.

The State cites Fla. App. Rule 5.1 as authority for a Trial Court to Stay a proceeding after an appeal is filed. In this case the Trial Court granted its first order granting the extension of the Speedy Trial Rule on March 18, 1975, and

the Notice of Appeal was not filed until April 4, 1975.

The State's argument that the initial Court's Order of March 18, 1975, was not limited to the sixty days period but overlooks the fact that the State apparently very well understood that said extension was only for the sixty day period by filing its Motion of April 16, 1975, for an additional extension.

We would again re-allege as set forth in Defendant's Brief, that the original Motion for Continuance was taken under the exceptional circumstantial provisions of Rule 3.191 (f) F.R.C.P. (Vol. IV, page 658) and that the Order granted was pursuant to said Motion and gave the State exactly what it requested, sixty days.

The State places much reliance upon STATE v PEARCE, 336 So. 2nd 1274 (1st DCA, 1976), but it is also noted that the Order appealed from in said case was from an Order dismissing the information against Appellees Pearce, et al, and that apparently said appeal was pursuant to 924.071 F.S. and not under Rule 3.191 (f) F.R.C.P.

The State had an election as to the procedure it would follow in prosecuting the Interlocutory Appeal and the Court should give consideration as to the representations made by the State at the time of requesting such extension, such as completing the appeal in sixty days and handling the appeal through the State Attorney's Office and not turning same over to the Attorney General's Office for the purpose of prosecuting such appeal.

CONCLUSION

It is again respectfully submitted, based upon Defendant's and State's Brief and this Reply Brief that the relief requested in Appellant's Brief should be granted and that the Defendant should be either immediately discharged or an Order entered reversing the Judgment and Sentence of the Circuit Court of Pasco County, Florida, in this case.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIGAAH ARDALLE JACOBS, :

Appellant, :

-vs- : CASE NO. 49,345

STATE OF FLORIDA, :

Appellee. :

CERTIFICATE OF SERVICE

I, LESTER BALES, JR., Attorney for Appellant, do, hereby, certify that a true copy of the Reply Brief of Appellant has been furnished by regular U. S. Mail to the Honorable ROBERT L. SHEVIN, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32304, this 1st day of Dec., 1976.

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